



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 28, 2004

Ms. Patricia J. Acosta
Assistant District Attorney
34th Judicial District
500 East San Antonio Street, 2nd Floor
El Paso, Texas 79901-2420

OR2004-3470

Dear Ms. Acosta:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 201169.

The Office of the District Attorney, 34th Judicial District (the "district attorney") received a request for the following information:

1. Any and all information regarding both D.I.M.S. and Grand Jury activity in the case of the nightstick incident . . . that was called into D.I.M.S. and subsequently presented to a Grand Jury, to include, but not be limited to: The D.I.M.S. case screening sheet and all reports. Who presented the case to the Grand Jury? When was it presented? What Grand Jury was it presented to? Was it no-billed or true-billed?
2. Any and all information concerning the case of Alber Machorro and Jose Garcia being presented to the 168th District Court Grand Jury on and subsequent to 12/17/03 by Marcos Lizarraga and Lorie Swopes, to include, but not be limited to: Over what days and dates was the case presented? Who presented it?
3. Any directives, written or memoranda documenting oral directives, sent out to the staff at the DA's Office regarding Attorneys Theresa Caballero and Stuart L. Leeds.

You state that you have released some responsive information to the requestor. You also state that the district attorney does not have information responsive to a portion of the first item of the request or to the third item of the request. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received). You claim that portions of the remaining requested information do not constitute public information subject to the Public Information Act (the “Act”). You also claim that portions of the remaining requested information are excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, you state that you have redacted portions of the submitted information that relate to cases other than the case for which the requestor seeks information. This information is not responsive to the present request and this decision does not address the public availability of any such non-responsive information.

We next address the fact that the request asks the district attorney to answer factual questions. This office has stated on numerous occasions that the Act does not require governmental bodies to answer factual questions or perform legal research. *See, e.g.*, Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990) (construing statutory predecessor). Likewise, a governmental body need not take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds that information on behalf of the governmental body that received the request. *See Gov’t Code* § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). A governmental body must only make a good faith effort to relate a request to information that it holds. *See Open Records Decision No. 561 at 8 (1990)* (construing statutory predecessor). We assume that the district attorney has made a good faith effort to relate the entirety of the request, including the factual questions, to information the district attorney maintains.

Article 20.02(a) of the Code of Criminal Procedure provides that “[t]he proceedings of the grand jury shall be secret.” This office has concluded that grand juries are not subject to the Act and that records that are within the constructive possession of grand juries are not public information that is subject to disclosure under the Act. *See Gov’t Code* § 552.003; *see also* Open Records Decision No. 513 at 3 (1988). We note, however, that if an investigation began before any information was submitted to the grand jury and the grand jury did not formally request or direct all of the governmental body’s actions in the investigation, then the information relating to the investigation is not deemed to be in the grand jury’s constructive possession. The fact that information collected or prepared by a governmental body is submitted to a grand jury, when taken alone, does not mean that the information is in the grand jury’s constructive possession when the same information is also held by the governmental body. *See Open Records Decision No. 513 at 3-4 (1988)*.

In this instance, you state that Enclosures 8 through 16 contain documents obtained from the grand jury secretary and claim that these records, therefore, are within the grand jury's constructive possession and not subject to the Act. We therefore understand you to assert that the information to which the requestor seeks access is in the constructive possession of the grand jury because the district attorney holds this information as an agent of the grand jury. *See* Gov't Code §§ 552.003(B), .0035(a); *see also* Open Records Decision No. 398 at 2 (1983) (grand jury is part of judiciary for purposes of the Act). Based on your representations, we conclude that the requested information is not subject to disclosure under the Act. As we are able to make this determination, we need not address your other arguments against disclosure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah I. Swanson", followed by a horizontal line extending to the right.

Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/krl

Ref: ID# 201169

Enc. Submitted documents

c: Mr. Stuart L. Leeds
303 Texas Ave., Ste. 1003
El Paso, Texas 79901
(w/o enclosures)